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FILED
FEB 27 1954
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 447 MISC.

WILLIAM VANDERWYDE,

Petitioner,

against

WILFRED L. DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

RUDOLPH STAND,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, WILLIAM VANDERWYDE—a state prisoner convicted by a special or so-called "blue ribbon" jury of Murder in the First Degree and sentenced to death — respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 21, 1954, affirming an order of the District Court for the Southern District of New York denying a petition for a writ of habeas corpus.

A stay of petitioner's execution was granted by the Court below on February 1, 1954, to permit consideration by this Court of the present application. The order granting such stay provides that if within 30 days there is filed with the Clerk of the Court below, a certificate of the Clerk of the Supreme Court that the certiorari petition and other

required papers have been filed, thereupon the stay shall continue pending the determination by this Court on such application.

On February 2, 1954, an order was made in the Court below, to remove the original certified record from its files and to transmit the same to this Court for use in connection with the certiorari petition herein.

Summary Statement of Matter Involved

The Previous Proceedings

(a) In the State Courts*

The petitioner was indicted in the Court of General Sessions of the County of New York for the crime of murder in the first degree (R. 5). The indictment, charged that, on or about May 18, 1951, the petitioner wilfully, feloniously, and of malice aforethought, shot and killed one Benjamin Dietz with a pistol (R. 5).

The petitioner (represented by assigned counsel) pleaded not guilty on October 25, 1951 (R. 7).

On November 28, 1951, the District Attorney served an affidavit and notice of motion for an order directing the trial of this action by a special jury, which application was granted over the petitioner's opposition (R. 12-17).

At the opening of the trial, petitioner renewed his opposition to be tried before a special panel of jurors (R. 20; 24).

On April 25, 1952, the special jury found the petitioner guilty of murder in the first degree and the trial court thereafter sentenced him to the punishment of death (R. 10-11; 294-6). The petitioner appealed to the New York State Court of Appeals (R. 2-4).

On January 15, 1953, the Court of Appeals, unanimously affirmed, without opinion, the said judgment of conviction (*People* v. *Vanderwyde,* 304 N. Y. 937).

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* References, unless otherwise indicated, are to the pages of the printed Record on Appeal in the Court of Appeals of the State of New York submitted herewith (Document No. 3).

On February 26, 1953, the Court of Appeals amended its remittitur to read, as follows:

> "Questions under the Federal Constitution were presented and necessarily passed upon by this court, viz., (1) the appellant contended that the order of the trial court, dated March 27, 1952, granting the motion of the District Attorney for a special jury to try the issues herein, over the opposition of the defendant, was based upon moving papers which were wholly insufficient to warrant the relief applied for; that the granting of said motion for a special jury on insufficient papers constituted a denial of due process and a violation of the defendant's rights under the Fourteenth Amendment of the Constitution of the United States. (2) The appellant contended that section 749-aa (4) of the Judiciary Law of the State of New York as construed and applied in this case constituted a denial of due process and a violation of his rights under the Fourteenth Amendment of the Constitution of the United States. This court held that the rights of defendant under the Fourteenth Amendment of the Constitution of the United States had not been violated or denied."

The decision is reported in 305 N. Y. 552.

(b) In the United States Supreme Court

The petitioner thereafter duly applied to the Supreme Court of the United States for a writ of certiorari to review the questions arising under the Federal Constitution which the New York State Court of Appeals certified were presented and necessarily passed upon herein.

On May 18, 1953, the Supreme Court denied the petition for certiorari, with no statement of reasons therefor (*Vanderwyde* v. *New York,* 345 U. S. 959). An application for a rehearing was denied on June 15, 1953 (345 U. S. 1004).

(c) The Federal Habeas Corpus Proceeding

On July 16, 1953, the petitioner filed in the District Court, a petition for a writ of habeas corpus, wherein he alleged the same grounds upon which the application for certiorari in the Supreme Court was predicated (Appendix to Appellant's Brief, pp. 3-12).*

Petitioner averred therein that he is not guilty of the crime for which he was tried, convicted and sentenced to death; that his imprisonment, restraint and sentence are illegal and void upon the ground that he is now in custody in violation of the Constitution of the United States, especially that clause of the Fourteenth Amendment which declares that no State shall deprive any person of life, liberty or property, without due process of law, nor deny to any person the equal protection of the laws (paragraph Fifth; App., p. 4).

Petitioner further alleged therein as follows:

> "FOURTEENTH: Your petitioner is further advised that despite the denial of a petition for a writ of certiorari by the Supreme Court, the Constitutional questions raised herein under the due process clause of the Fourteenth Amendment and the merits of the instant petition remain open for consideration and determination in habeas corpus proceedings in this Court.
>
> FIFTEENTH: In the petition for a writ of certiorari, great reliance was placed upon the 18th Annual Report (1952) of the Judicial Council of the State of New York (Appendix B, p. 23). Its Recommendation and Survey relating to the abolition of special juries—on the basis of *presently existing facts* and statistical tables covering the years 1941 through 1950—disclosed to absolute demonstration that the fundamental concept of a special or so-called "blue ribbon" jury is repugnant to the traditional right of a person to be

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* References are to the pages of the certified record (Appendix to Appellant's Brief) submitted herewith.

tried by a jury of his peers. The respondent, in opposition to the petition, asserted that no substantial question was presented and cited the five-to-four decisions of *Fay* v. *New York,* 332 U. S. 261 (1947) and *Moore* v. *New York,* 333 U. S. 565 (1948). The respondent also asserted that the statistics contained in the Judicial Council's Report were not made part of the record considered by the courts below, nor was the respondent accorded an opportunity to controvert or explain them. A copy of the petition for rehearing is submitted to this Court on the legal question herein involved.

SIXTEENTH: If such official statistics could in fact be controverted or explained, by the respondent, petitioner submits that a hearing should be ordered by this Court to determine the facts and appropriate findings and conclusions of law can then be made. In this way an adequate and clear record may be established.

SEVENTEENTH: The respondent in opposition to the petition for a writ of certiorari completely ignored the unfair system in operation to which petitioner called attention in his original petition and supporting brief at pages 6-7; 9-10; 14-15. It was pointed out that the prosecutor kept a secret file relating to the "past performances" of "repeater" special jurors thus enabling him to exclude a proposed special juror who may have formerly served on an acquitting jury, with the result that—unknown to the defense—the jury box can be filled in part or entirely of special jurors who have previously voted for convictions. Such a system is essentially unfair and petitioner submits that a hearing should be ordered by this Court in order to determine whether fundamental rights specially secured by the Federal Constitution are invaded by such mode of trial." (App., pp. 8-9)

The petitioner prayed that the respondent be required to appear and answer the allegations of the petition and asked for *"a full and complete hearing"* in respect of the

merits of his petition for a writ of habeas corpus (App., p. 11).

The District Court instead of issuing the writ, directed the respondent to show cause why the writ should not issue (App., p. 13). *The respondent did not make or file a return.* After argument by counsel for the respective parties and the submission of briefs, the application for habeas corpus was denied (J. Skelly Wright, U. S. D. J.). The District Judge rendered an opinion (App., pp. 14-19).

A certificate of probable cause was duly issued by Judge Wright (App., p. 20). On appeal to the United States Court of Appeals for the Second Circuit, the order was affirmed on opinion below (App., pp. 23-4).

Jurisdiction

The judgment of the Court of Appeals was entered on January 21, 1954 (App., p. 25). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

At this point, it may be noted that the Supreme Court has finally decided an issue which has been dividing the lower federal courts during the past few years—the effect of the Supreme Court's refusal of certiorari on direct review of a state court criminal judgment, when a similar issue arises in a subsequent habeas corpus proceeding before a federal district court.

A denial of certiorari by the Supreme Court to review a decision of a State Supreme Court affirming a conviction (with no statement of reasons therefor, as in the case at bar) should be given no weight by a Federal Court in passing upon the same petitioner's application for a writ of habeas corpus (*Brown* v. *Allen*, 344 U. S. 443, 448-497).

The Supreme Court has frequently reiterated that "the denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times" (*United States* v. *Carver*, 260 U. S. 482, 490; *Sunal* v. *Large*, 332 U. S. 174, 181; *Wade* v. *Mayo*,

334 U. S. 672, 680; *Maryland* v. *Baltimore Radio Show*, 338 U. S. 912, 917-20).

In view of the foregoing authorities, there can no longer be any doubt or uncertainty that a simple order—as in this case—denying a petition for a writ of certiorari is not designed to reflect the Supreme Court's views either as to the merits of the case or as to its jurisdiction to hear the matter and should be given no legal significance or effect when an application for habeas corpus in that case comes before a Federal District Court.

Questions Presented

1. Whether the petitioner was entitled to a hearing and the opportunity of adducing testimony and competent evidence on the factual issues raised in his petition for a writ of habeas corpus, pertaining to:

(a) the statistics contained in the 18th Annual Report (1952) of the Judicial Council of the State of New York in its survey of special juries covering the judicial years 1941 through 1950;

(b) the unfair system in operation with respect to the secret file kept by the prosecutor of the past performances of "repeater" blue ribbon jurors.

2. Whether the District Court should have held a full judicial inquiry and should have made and filed its findings of fact on these issues in compliance with the mandate of 28 U. S. C. § 2243:

> "* * * The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require."

3. Whether the courts below erred in denying the petition for a writ of habeas corpus on the grounds assigned for its decision.

4. Should the question of the constitutionality of the use of special juries under the New York Statute upheld by this Court in *Fay* v. *New York* (1947), 332 U. S. 261,

and *Moore* v. *New York* (1948), 333 U. S. 565, be re-examined in the light of the 18th Annual Report (1952) of the Judicial Council of the State of New York reflecting *presently existing facts* and changing conditions?

Statute Involved

The pertinent statutory provisions are printed in Appendix A, *infra*, page 24.

Reasons for Granting the Writ

1. In violation of settled law and the constitutional guarantees of the petitioner, there has never been a hearing on the questions of fact raised in this habeas corpus proceeding. The decision of the court below is believed to be erroneous and conflicts with applicable decisions of this Court (Rule 38 (b) of the Rules of the Supreme Court) in habeas corpus proceedings.

See:

Moore v. *Dempsey*, 261 U. S. 86, 92;
Johnson v. *Zerbst*, 304 U. S. 458, 466;
Walker v. *Johnston*, 312 U. S. 275, 285-6;
Holiday v. *Johnston*, 313 U. S. 342, 351;
Waley v. *Johnston*, 316 U. S. 101, 104.

2. In 1947 and 1948 this Court—on the basis of the record then presented—sustained the constitutionality of the New York special jury statutes in two cases, in five-to-four decisions (*Fay* v. *New York*, 332 U. S. 261 (1947); *Moore* v. *New York*, 333 U. S. 565 (1948)).

In view of these cases, the Judicial Council in its 18th Annual Report (1952) conducted a survey for the purpose of re-evaluating its past recommendations for the abolition of special juries as unjust, undesirable and unnecessary in the light of presently existing facts. Reasserting its belief that the basic concept of a special jury is repugnant to the traditional right of a person to be tried by a jury of his peers and commenting on the *Fay* and *Moore* decisions, *supra*, the Judicial Council:

"• • • suggested that a re-appraisal of the application of standards under the law on a current basis might have changed the result. • • •

The wisdom of sending men to the electric chair on their conviction by a jury selected under a system which four justices of the Supreme Court of the United States have condemned as unconstitutional on weaker evidence of its defects than is here presented is questionable. Especially is this true when there is a constitutional system already in existence, the merit of which is publicly testified to by judges in our courts who are in daily contact with it" Original Record, Document No. 5, (Appendix B, p. 23, at pp. 158-9).

3. In the *Fay* and *Moore* cases, *supra,* no questions appear to have been raised, as in this case, as to (a) the sufficiency of the affidavit in support of the motion for a special jury, which failed to allege all the essential facts necessary to bring the case within the conditions imposed by the statute respecting special juries (R. 14-15), and (b) whether, in these circumstances, the statute involved as construed and applied to the petitioner constituted a denial of the due process of law or equal protection clause of the Constitution, since the right to a special jury exists only in those cases provided for in the statute and should not be granted as of course.

4. We respectfully submit that the judgment of the Court below should be reviewed since it is based upon the aforementioned decisions, which we urge ought to be re-examined from the viewpoint of presently existing facts as revealed by the Judicial Council's Survey Relating to Special Juries in its 18th Annual Report, 1952.

5. The Judicial Council's exhaustive and critical analysis of the problem adequately meets the questions raised by this Court in the *Fay* and *Moore* cases, *supra,* particularly in the tables appended to its Survey, dealing with the Disposition of Defendants Tried Before Special Juries; Comparisons of Occupations of Special and General Jurors; Comparison of the Education of Special and General

Jurors; and Comparison of the Number of Women on Special and General Jury Panels (Appendix B, *infra,* pp. 167-71). We submit that these official statistics reflecting presently existing conditions furnish the most cogent reasons for a further consideration and complete re-examination of this important question in the administration of justice.

6. By reason of the limited number of the jurors (about 3,000) on the special panel, the same jurors are frequently summoned and examined in successive cases, year in and year out, so that it is not unusual to find on any special panel of 125 or more, a predominant number who have served before in capital cases.

As shown by the record in this case (R. 20-21) the District Attorney's office in New York County is armed with information as to the "past performances" of the "repeater" jurors in prior cases and knows whether they served on juries voting for conviction.

Individual judges may in some cases as a favor allow this secret information to be given to defense counsel, but some judges refuse to do so upon the ground that such records are confidential. A trial under such a system lacks the fundamental essentials of due process and shocks one's sense of right and fair play. "* * * the cards [are] stacked from the beginning" (*Frazier* v. *United States,* 335 U. S. 497, 517, Jackson J., dissenting).

One of the fundamental safeguards to an impartial trial is thus broken down and one of the securities to an impartial verdict is overthrown.

WHEREFORE, your petitioner respectfully prays that this petition for a writ of certiorari should be granted and for such other and further relief as this Court may deem just and proper.

Dated: New York, February 26, 1954.

WILLIAM VANDERWYDE,
Petitioner,

By: RUDOLPH STAND,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the District Court (J. Skelly Wright, U. S. D. J.) is to be found at App., pages 14-19. The case is reported in 113 F. Supp. 918. The Court of Appeals affirmed the order on opinion below (App., pp. 23-4). It has not yet been officially reported.

Jurisdiction

The statement under which the jurisdiction of this Court is invoked is set forth in the petition.

Statement of the Case

The statement of the questions presented and the factual matter relevant to this application appear in the petition; in the interest of brevity they will not be repeated here.

Argument

The reasons relied on for the allowance of the writ are set forth in the petition. The points of the argument coincide therewith and are discussed below.

POINT I

Petitioner was entitled to a hearing on his petition for a writ of habeas corpus.

We think that no extended discussion of this point is necessary. Fundamental concepts of due process and the command of the statute (28 U. S. C. § 2243) require that the trial court shall conduct a judicial inquiry into the facts raised in the petition for habeas corpus and should make and file findings of fact thereon. The question of the right to a hearing on factual issues in habeas

corpus proceedings has been frequently considered in various decisions of this Court.

In *Walker* v. *Johnston, supra,* 312 U. S. 275, 285-6, Mr. Justice Roberts stated:

> "As we said in *Johnson* v. *Zerbst,* 304 U. S. 458, 466, 'Congress has expanded the rights of a petitioner for *habeas corpus* • • • 'There being no doubt of the authority of the Congress to thus liberalize the common law procedure on *habeas corpus* • • • it results that under the sections cited a prisoner in custody • • • may have a judicial inquiry • • • into the very truth and substance of the causes of his detention' • • •' Such a judicial inquiry involves the reception of testimony, as the language of the statute shows."

In *Holiday* v. *Johnston, supra,* 313 U. S. 342, 353-4 (a habeas corpus case) the Court said:

> "The District Judge should himself have heard the prisoner's testimony and, in the light of it and the other testimony, himself have found the facts and based his disposition of the cause upon his findings. The petitioner has not been afforded the right of testifying before the judge, which the statute plainly accords him. In order that he may have that right we reverse the judgment and remand the cause to the District Court for further proceedings in conformity to this opinion. We express no opinion as to the weight or sufficiency of the evidence heretofore adduced. The issues of fact will be for solution by the District Court upon a further hearing."

See also:

Waley v. *Johnston, supra,* 316 U. S. 101, 104.

The petitioner asked for "a full and complete hearing" respecting the merits of his petition for habeas corpus (App., p. 11) relating to:

> (a) the statistics contained in the 18th Annual Report (1952) of the Judicial Council of the State of

New York in its survey of special juries covering the years 1941 through 1950;

(b) the unfair system in operation with respect to the secret file kept by the prosecutor of the past performances of "repeater" blue ribbon jurors (App., pp. 8-9).

In rejecting the petitioner's claim that use of the special jury deprived the petitioner of due process, the District Judge in his decision, relied on the cases of *Fay* v. *New York, supra*, and *Moore* v. *New York, supra* (App., p. 16). The allegations respecting the unfair system relating to the prosecutor's secret file concerning the past performances of "repeater" blue ribbon jurors—are not discussed in the opinion of the court below.

The District Judge, however, in the course of his opinion, stated (App., p. 17):

> "A successful challenge to this judgment under the due process clause depends upon a showing that the defendant's trial was so unfair as to deprive him of due process of law and the burden of proof is upon the petitioner."

The petitioner concedes that the burden rested on him, but in the words of Mr. Justice Reed, in *Hawk* v. *Olson*, 326 U. S. 271, at p. 279 (*a habeas corpus case wherein, as here, no response was filed or evidence received in the district court*):

> "Petitioner carries the burden in a collateral attack on a judgment. He must prove his allegations but he is entitled to an opportunity."

"Due process of law" is incapable of exact definition yet "the fundamental requisite of due process of law is the opportunity to be heard" (*Grannis* v. *Ordean*, 234 U. S. 385, 394).

POINT II

The New York Judiciary Law, Section 749-aa, Subd. 4, as construed and applied to the petitioner constituted a denial of the due process of law or equal protection clause of the Federal Constitution.

While we concede that the application if properly made and for proper reasons, is addressed to the sound discretion of the Court, we respectfully contend that no construction should be put upon the statute that would allow it to be wholly disregarded or to be lightly considered. On the contrary, courts should be reluctant to grant an application for a special jury and should deny such applications except in cases where there is a showing of a real necessity therefor. The statute should be strictly construed and not extended by implication to cases not falling within its terms.

It is well settled that a statute may be constitutional as applied to one set of circumstances and unconstitutional when it is made to cover a situation not embraced within its contemplation (*Dahne-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 289; *Nashville, C. & St. L. Ry. Co.* v. *Walters,* 294 U. S. 405; *Mintz* v. *Baldwin,* 2 F. Supp. 700, affirmed 289 U. S. 346).

The District Judge cited in his opinion (App., p. 16) the case of *People* v. *Hall* (1901), 169 N. Y. 184 where the Court of Appeals reviewed an order granting a special jury and there held that, inasmuch as the indictment was for the crime of murder in the first degree that such fact alone was sufficient to warrant the making of the order, in the sound discretion of the Court. Indeed, the respondent in the New York Court of Appeals, took the position that the affidavit challenged here was in the "usual form".

It is a settled principle of interpretation that you can neither read words into a statute, nor out of a statute. If the Legislature intended that every capital case must be tried by a special jury, it was easy to say so and insert

words to that effect. A court in interpreting a statute cannot hold that the Legislature must have intended to do that which it has failed to do. A court's refusal to recognize the plain meaning of the statute indicates a purpose to change the law by judicial action.

The reason underlying the *Hall* case, *supra,* 169 N. Y. 184, 196-7, appears to rest on the assumption that in prescribing the qualifications of special jurors, "the legislature seems to have had capital cases primarily in mind, for the Commissioner is prohibited from selecting any person as a special juror" who (a) has conscientious scruples against the death penalty, or (b) who has such opinions as would prevent a verdict of guilty in any case upon circumstantial evidence, or (c) who has a prejudice against any particular defense to a criminal charge as would prevent his finding a fair and impartial verdict upon its merits. The Court there further said at pages 196-7:

> "The Commissioner is required to personally examine every one selected as a special juror with reference to these matters *among others* before making the selection". (Emphasis supplied)

Let us examine the statute (Judiciary Law, Sec. 749-aa, subd. 2) and note what these other matters are. We find that the Commissioner is prohibited from selecting (d) a person who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise and render an impartial verdict on the evidence, (e) a person who has any prejudice against any state law, or (f) a person who avows that he cannot in all cases give to a defendant who fails to testify the full benefit of the statute that such failure shall not create any presumption against him.

Obviously, all the matters stated above except as to (a) the infliction of the death penalty if the crime charged be punishable by death, have general application to any criminal case. Yet it has never been urged that an accused may be put to trial before a special jury, over his objection, because the case against him rests, for instance, solely upon circumstantial evidence.

The statute clearly limits the granting of the application to such cases as are shown by competent and sufficient proof to come within its scope. A special jury should not be ordered generally, systematically or indiscriminately for the mere asking. That is the basic error in this case. Such a result will produce injustice.

The *Hall* case, *supra,* 169 N. Y. 184 was decided over 50 years ago and is, of course, wholly inapplicable to present day conditions. The administration of criminal justice has made great progress since then.

In its 18th Annual Report (1952) of the Judicial Council, annexed to the original record (Document No. 5, Appendix B, p. 23), it summarizes its findings as follows at page 158:

"1. The special jury is no longer needed because the general jury system is producing a fair cross section of the community capable of determining any case.

2. There are no objective statutory qualifications by which the selection of special jurors may be differentiated from those selected for the general jury panel.

3. The special jury panel is a less fair cross section of the community than the general jury panel because of greater imbalances as to:

(a) occupation, there being a disproportionate weighting in favor of 'business' people as opposed to 'working' people;

(b) educational qualifications;

(c) sex, there being a smaller proportion of women to men on the special jury panel than on the general jury panel."

The Judicial Council was established by the Legislature (Judiciary Law, §§ 40-48) to make a continuous survey and study of matters relating generally to the administration of justice in all courts of the State. Its membership includes the Chief Judge of the Court of Appeals, the presiding

justices of each Appellate Division of the Supreme Court and leading members of the Bar and of the Legislature. (Hon. Herbert Brownell, Jr.—now Attorney General of the United States—is one of the signers of the 18th Annual Report (1952)).

Even before the impartial re-appraisal of the problem by this official body on the basis of *presently existing facts and conditions,* Mr. Justice Murphy in his dissenting opinion in the *Fay* case, *supra,* 332 U. S. 261, 296, (concurred in by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Rutledge), declared in 1947:

> "The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a cross-section of the community. That means that juries must be chosen without systematic and intentional exclusion of any otherwise qualified group of individuals * * * Only in that way can the democratic traditions of the jury system be preserved * * *."

POINT III

The cases of *Fay* v. *New York,* 332 U. S. 261 (1947) and *Moore* v. *New York,* 333 U. S. 565 (1948) relied on by the Court below, in support of its decision, are clearly distinguishable.

The opinion of the District Judge states (App. 14):

> "* * * Having exhausted his state remedies, and having applied unsuccessfully to the Supreme Court for a writ of certiorari, he (petitioner) is properly before this Court on motion for writ of habeas corpus * * *."

The Court below ruled, however, that the cases of *Fay* v. *New York,* and *Moore* v. *New York, supra,* resolved the issue made here.

The basic contention of the petitioner is that there exists a marked distinction between the case at bar and the *Fay* and *Moore* cases.

The Court in the *Fay* case was willing to re-open the question of the constitutionality of the special jury system and the administration of the New York statute "in the light of more recent trends of decision and of particular facts about the operation of the jury system not advanced in support of the argument in the earlier case, to disapprove the special jury system" (p. 270).*

In the *Fay* case, Mr. Justice Jackson, stated at page 265 of the majority opinion:

> "A dual system of juries presents easy possibilities of violation of the Fourteenth Amendment and we took these cases by certiorari to examine the charges of unconstitutionality."

It must be borne in mind that the statistics then before the Supreme Court in the *Fay* case were *more than ten years old* (p. 281). The Supreme Court accordingly took the position that the evidence as shown by the Reports of the Judicial Council was not sufficiently recent to avail the petitioners in that case and sustained the constitutionality of the New York special jury statute in a sharply split five-to-four decision.

Mr. Justice Jackson declared at page 272 in the *Fay* case, *supra*:

> "As to the actual results of application of the statute, the litigants are in controversy. The New York courts, doubtless influenced by the fact that long ago they had upheld similar statutes, made no findings of fact and wrote no opinion on the subject. It is to be regretted that we must deal with questions of fact without aid of findings by the courts whose experience with the system and proximity to the local conditions with which the special jury customs are so interwoven would entitle their findings to very great weight. We would, in any case, be obliged on a constitutional question to

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* The Court referred to *Hall* v. *Johnson*, 186 U. S. 480, which is the same case as *People* v. *Hall*, 169 N. Y. 184, decided in 1901, cited in the opinion of the District Judge (App. page 16).

reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence."

It is thus apparent that the *Fay* and *Moore* cases, were each decided upon its special circumstances and must be understood to be confined to the record then before the Supreme Court. To what extent a different record would have resulted in a different conclusion was not indicated. It certainly cannot be reasonably argued that the Supreme Court intended to put an irrevocable end and to close the door forever on this highly controversial and serious question in the administration of criminal justice.

No question—as here—was raised in the *Fay* and *Moore* cases, as to the legal insufficiency of the District Attorney's affidavit in support of the motion for a special jury (R. 14-15).

We have pointed out that the prosecutor kept confidential records made up of the "past performances" of special jurors who have previously served in capital cases, thus enabling him to exclude a proposed juror who may have served on an acquitting jury by utilizing his thirty peremptory challenges, with the result that—unknown to the defense—the jury box can be filled entirely of special jurors who have previously voted for convictions.

Although the trial judge in this case directed the prosecutor to make such secret records available to the defense, (R. 20-21) these records, however, were never actually examined by defense counsel, who relied wholly upon the prosecutor's statements as to their contents. Such mode of trial is essentially unfair and liable to grave abuse. The danger that lurks in this system can easily deprive a capital trial of any semblance of fairness. It has no proper place in our American jurisprudence. "The right to fair trial is the right that stands guardian over all other rights" (*Dennis* v. *United States,* 339 U. S. 162, 173).

Here, once more, is another issue which was not before the Supreme Court in the *Fay* and *Moore* cases. A question so fundamental to the rights of defendants, which

arises frequently in capital cases, is a federal question of the utmost importance.

In *Hildredth* v. *Troy,* 101 N. Y. 234, at 239-40, the Court of Appeals declared:

> "The jury system to be successfully administered requires not only absolute impartiality in fact, in the drawing of jurors, but such an adherence to forms and methods of procedure as will secure public confidence and prevent any suspicion of improper or unfair dealing."

A fair trial is in all of the decisions of the Supreme Court declared to be one of the conditions without which due process of law cannot exist (*Ong Chang Wing* v. *United States,* 218 U. S. 272, 279-80; *Hill* v. *Texas,* 316 U. S. 400, 406).

The right of peremptory challenge in capital cases, has been spoken of as "one of the most important of the rights secured to the accused" (*Pointer* v. *United States,* 151 U. S. 396, 408).

The defendant is entitled to be tried by the first twelve competent, unbiased and qualified jurors drawn by lot.

To be deprived of a juror who is competent impairs a substantial right of a defendant. The rejection of a competent juror is ground of error; although the jurors who actually try the case are competent, it is the right of a party to require that the range of selection shall not be limited by excluding without cause a competent juror from the panel (*Hildredth* v. *Troy, supra,* 101 N. Y. 234; *People* v. *McQuade,* 110 N. Y. 284, 306).

The printed record on appeal to the New York State Court of Appeals submitted herewith (Document No. 3) does not contain the minutes of the *voir dire* examination of the jurors as to their previous service as jurors in capital cases and the challenges that were taken to individual jurors by the People or by the defendant. The practice of including the examination of the talesmen in the records in homicide cases was discontinued in New York State over 20 years ago.

What actually transpired during the examination of the jury herein, whether or not petitioner or his counsel actually saw the secret records which the court directed to be made available and all the surrounding circumstances can only be revealed on a hearing to which the petitioner claims he was entitled in this habeas corpus proceeding.

This Court has already held that the preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury, and that a denial of such opportunity constitutes reversible error (*Morford* v. *United States,* 339 U. S. 258).

A fortiori, petitioner was entitled to disprove bias, in the selection of the final arbiters of his fate.

POINT IV

The question of the constitutionality of the special jury system and the administration of the New York Statute should be re-examined in the light of the 1952 New York Judicial Council Report and the statistics therein contained.

The 1952 Judicial Council's Report is not the partisan plea of an advocate. It constitutes a critical study and impartial analysis made by an official body of an important and serious problem in the administration of criminal justice and its survey is entitled to great consideration and respect.

The District Judge in his opinion stated (App. page 16):

> "Petitioner apparently overlooks the fact that the statute provides for the use of a special jury not only in intricate cases but also in cases of importance."

The Judicial Council, however, state at page 159 of Appendix B (Document No. 5):

> "Even though murder trials are in some respects more 'important' than others, there does not seem to be any factual basis for the assumption that they are more difficult of proof or more complex or require more

> understanding or ability on the part of the jurors than many other types of cases. Nor can it be seriously argued that murder trials in counties of more than one million population are more intricate or difficult of comprehension than in counties of less than one million.
>
> Trying one indicted for murder in Kings County by a special jury, aside from any question of constitutionality, but trying those similarly indicted in nearby Nassau County by a general jury does not readily appeal to reason or sound public policy."

The guaranty of due process of law requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land' " (*Hebert* v. *Louisiana,* 272 U. S. 312, 316-7).

Congress has liberalized and expanded the concept of habeas corpus in interests of protecting individual liberties, so that federal courts must now examine all facts concerning a person's detention and thereby insure that justice has been done (*Holiday* v. *Johnston, supra,* 313 U. S. 342, 351, 352).

To do otherwise, in the present case, means the death of this petitioner, the victim of "a tragic consequence that can flow from the use of the 'blue ribbon jury' " (Dissenting opinion by Justice Murphy, in which Justices Black, Douglas, and Rutledge concurred in *Moore* v. *New York, supra,* 333 U. S. 565, 569).

This Court has squarely announced that it has never felt constrained to follow a previous decision which upon reexamination is believed erroneous. (*Smith* v. *Allwright,* 321 U. S. 649, 665; See also, *Helvering* v. *Hallock,* 309 U. S. 106; *United States* v. *Rabinowitz,* 339 U. S. 56.) On the basis of the 1952 New York Judicial Council Report and the statistics therein contained, we earnestly urge that the question herein involved be re-examined. Surely, in the light of this Report, much stronger reasons now exist which

call for a review of the constitutional question in the present case as compared with the grounds prompting this Court to review the *Fay* and *Moore* cases.

CONCLUSION

For these reasons, it is respectfully submitted that a writ of certiorari should issue as prayed for in the petition.

RUDOLPH STAND,
Counsel for Petitioner.

APPENDIX A

Statute Involved

The New York Statute involved is *New York Judiciary Law, Section 749-aa, subd. 4,* and we quote its pertinent provisions as to the *procedural* and *factual* requirements of an application for a special jury in certain counties:

> "4. *Application for special jury.* Whenever an issue of fact has arisen in any * * * criminal action * * * the district attorney * * * may apply for a special jury to try such issue. Such application * * * must be made upon the indictment, the plea thereto and an affidavit * * * upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject matter of the indictment or the issue to be tried, has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing such trial be had by a special jury, and such trial shall be had accordingly * * *."

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Supreme Court of the United States

October Term, 1953

No. 447 Misc.

WILLIAM VANDERWYDE,
Petitioner,

against

WILFRED L. DENNO, Warden of Sing Sing Prison, Ossining, New York,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NATHANIEL L. GOLDSTEIN
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Proceedings Below

A. The Actions of the Courts Below

Petitioner was convicted of the crime of Murder in the First Degree (N. Y. Penal Law, §1044, subd. 1) by a judgment of the Court of General Sessions, New York County, rendered on April 30, 1952, and was sentenced to death (10-1).* The judgment of conviction was affirmed, on January 15, 1953, by the Court of Appeals of the State of New York (*People* v. *Vanderwyde*, 304 N. Y. 937, motion to amend remittitur granted, 305 N. Y. 552).

* References are to pages of the printed record on appeal to the New York State Court of Appeals.

Following unsuccessful efforts in this Court to obtain a writ of certiorari to the New York State Court of Appeals (*Vanderwyde* v. *New York,* 345 U. S. 959, motion for rehearing denied, 345 U. S. 1004), the petitioner applied to the United States District Court for the Southern District of New York, on July 16, 1953, for a writ of *habeas corpus* to deliver him from the custody of respondent Denno, the warden of New York's Sing Sing Prison, where he is confined pending execution. That application was denied by the District Court (J. SKELLY WRIGHT, U. S. D. J.), on July 29, 1953 (*Vanderwyde* v. *Denno,* 113 F. Supp. 918) and the determination of the District Court was affirmed by the United States Court of Appeals for the Second Circuit on January 21, 1954 (New York Law Journal, January 22, 1954, p. 13, col. 3). It is that affirmance that the petitioner seeks to have reviewed by means of the present petition.

In the event that this Court denies the present petition, the New York State Court of Appeals must, on proper application, fix a new date for execution of the petitioner, since the date last specified by that court for that purpose passed while a stay of execution, granted by the District Court, was in effect (see N. Y. Code of Criminal Procedure, §503).

B. The Questions Presented to the Courts Below

The jury that found petitioner guilty of Murder in the First Degree were drawn, on motion of the prosecution and over petitioner's opposition, from a panel of special jurors for New York County, maintained as required by section 749-aa of the New York Judiciary Law (7, 16-18,

20, 24). The composition of that panel was not necessarily the same as that of the general jury panel coexisting under the mandate of Article 17 of the Judiciary Law (§§590-608).

In the New York State courts, the defendant contended, unsuccessfully, that the motion papers on which the special jury was ordered were legally insufficient because, instead of stating facts showing the existence of the conditions under which section 749-aa, subdivision 4, of the Judiciary Law permits the use of a special jury, they merely alleged the existence of those conditions in conclusory form, following the language of the statute (20, 24; appellant's brief on appeal to New York Court of Appeals, pp. 64-71). He also contended unsuccessfully that, under those circumstances, the ordering of a special jury and the construction and application of section 749-aa, subdivision 4, of the Judiciary Law as authority therefor, deprived him of rights guaranteed by the Fourteenth Amendment to the Constitution, including the due process of law (application for *habeas corpus*, paragraph SEVENTH; appellant's brief on appeal to New York Court of Appeals, pp. 64-71).

Applying to this Court for certiorari to the New York Court of Appeals, petitioner assigned those contentions as "Questions Presented" by his application, and also constructed his argument on them in his brief to include a specification that he had been denied the equal protection of the laws (*Vanderwyde* v. *New York*, 345 U. S. 959, application for certiorari, pp. 4, 11-19).

In addition—not as "Questions Presented," but as reasons for allowance of the writ—he contended that the composition of the special panel was unfair (*id.*, pp. 7-9, 18-19;

s. c., 345 U. S. 1004, petition for rehearing, pp. 3-5, 8). Invoking statistics published in the 1952 report of the New York State Judicial Council, he asserted that, as compared to the general panel, the special panel was marked by a high ratio of guilty verdicts returned in criminal cases, by a disproportionate weighting in favor of "business" people as opposed to "working" people, and by imbalances as to education and sex (*Vanderwyde* v. *New York*, 345 U. S. 959, application for certiorari, pp. 18-19, appendix B; s. c., 345 U. S. 1004, petition for rehearing, pp. 3-5).

He also claimed, as a corollary, that the "fundamental concept" of the special jury system was unconstitutional because it deprived a defendant of the right "to be tried by a jury of his peers" (*Vanderwyde* v. *New York*, 345 U. S. 1004, petition for rehearing, pp. 3-4).

And, finally, he based a further claim of denial of due process upon an assertion that the prosecution maintained a secret record of special jurors' past actions in other cases, which it could use, in combination with its peremptory challenges (see N. Y. Code of Criminal Procedure, §373), to secure a jury containing persons who had voted for convictions in the past (*id.*, pp. 6-8; see s. c., 345 U. S. 959, application for certiorari, pp. 6-7, 9-10, 14-15).

In his application for *habeas corpus* in the United States District Court, following this Court's denial of certiorari, petitioner incorporated the contents of the certiorari application and petition for rehearing thereon and requested a hearing for the purpose of proving the contentions therein contained (application for *habeas corpus*, paragraphs SIXTH, FIFTEENTH, SIXTEENTH and SEVENTEENTH).

The Question Presented to this Court and the Respondent's Position

Upon the filing of petitioner's application for *habeas corpus,* the District Court made an order requiring respondent Denno to show cause why the writ should not issue and directing that copies be served on the New York State Attorney General and the New York County District Attorney (see order to show cause, dated July 16, 1953). On the return date, the court heard argument by counsel and, thereafter, denied the application (see orders dated July 29, 1953). In its opinion, the court stated that it could pass on those grounds only that had been argued and passed on by the state courts, and that the only constitutional issue there raised—"the constitutionality of the use of special juries under the New York statute"—had already been resolved by this Court in *Moore* v. *New York,* 333 U. S. 565, and *Fay* v. *New York,* 332 U. S. 261 (opinion, pp. 2-3, 4-5). In addition, the court stated that the proof offered by the petitioner to sustain the claim that the composition of the special jury panel was such as to deprive him of the due process of law was insufficient for that purpose, since petitioner did not offer proof that would show purposeful exclusion or discrimination in the preparation of the special jury list or a resultant denial of a fair trial (*id.*, pp. 5-6).

The United States Court of Appeals affirmed the decision on the opinion of the District Court.

The question presented to this Court is whether or not the District Court was correct in denying petitioner a full hearing on the ground that the only constitutional issue

urged by him in the state courts—the constitutionality of the use of special juries under the New York statute—must be resolved against him, and upon the ground that the proof offered in support of his attack on the composition of the special jury panel was insufficient to show a denial of due process.

The respondent's position is that no substantial constitutional question was raised by petitioner's claims in either the state or federal courts at any stage, and that the District Court was, therefore, without power to issue the writ of *habeas corpus*. It is also the respondent's position that such power was doubly lacking with respect to the claims that the use of a special jury under the New York law is unconstitutional, that the composition of the special jury panel is violative of the right to a fair trial and that the prosecution's use of its record of special jurors' past actions was also violative of such right, because none of those claims was made in the state courts.

ARGUMENT

The District Court was without power to issue the writ of *habeas corpus* in this case [answering petitioner's Points I, pp. 11-13; II, pp. 14-17; III, pp. 17-21; IV, pp. 21-23].

The only ground on which, in the New York State courts, petitioner attacked the use of a special jury was that the motion papers on which the trial court granted the prosecution's application for such a jury alleged only conclusions, rather than facts (20, 24; appellant's brief on appeal to New York Court of Appeals, pp. 64-71). He claimed that that alleged circumstance rendered the order-

ing of a special jury a violation of the Fourteenth Amendment to the Constitution and, concurrently, that section 749-aa, subdivision 4, of the New York Judiciary Law, defining the showing that must be made by a party litigant to authorize the use of a special jury, had been unconstitutionally construed and applied in his case (appellant's brief on appeal to the New York Court of Appeals, pp. 65-67; see *People* v. *Vanderwyde, supra,* 305 N. Y. 552; application for *habeas corpus,* paragraph NINTH).

That claim, going merely to a matter of state procedure presenting no semblance of basic unfairness, did not serve to raise a substantial constitutional question, and was properly rejected by the District Court for that reason (opinion, pp. 4-5; *Betts* v. *Brady,* 316 U. S. 455; *Snyder* v. *Massachusetts,* 291 U. S. 97; *Brown* v. *New Jersey,* 175 U. S. 172; see *Frank* v. *Mangum,* 237 U. S. 309, 338-343; see *Vanderwyde* v. *New York,* 345 U. S. 959, respondent's brief in opposition to certiorari, pp. 4-5).

It was in this Court, on his first application for certiorari, that petitioner first made the claim, later reiterated in the District Court, that the composition of the special jury panel was so weighted as to render it violative of the Constitution (*Vanderwyde* v. *New York,* 345 U. S. 959, petition for certiorari, pp. 7-9, 18-19; appendix B; s. c., 345 U. S. 1004, petition for rehearing, pp. 3-5; application for *habeas corpus,* paragraphs SIXTH and FIFTEENTH). At no time did he offer to prove either that there was any purposeful class exclusion or discrimination or that the special jury panel's composition was unfair except as it deprived him of a trial by his "peers." His offer to show merely a weighting of the panel in favor of "business" people, as

opposed to "working" people, without offering to prove class exclusion or discrimination or resultant unfairness, raised no question that had not previously been disposed of in *Moore* v. *New York, supra,* 333 U. S. 565, and *Fay* v. *New York, supra,* 332 U. S. 261.

Petitioner's third claim—that the use of a special jury under the New York law was unconstitutional—was, in effect, an attack on the concept of the special jury as such, and, in that form, first appeared among his contentions in this Court (*Vanderwyde* v. *New York,* 345 U. S. 1004, petition for rehearing, pp. 3-4). It was utterly without merit in view of this Court's positive holdings in *Moore* v. *New York, supra,* and *Fay* v. *New York, supra,* that the use of a special jury is not in itself repugnant to the Constitution.

It was in this Court also that petitioner first claimed that the prosecution's keeping of records of special jurors' past actions created a constitutional question (see *Vanderwyde* v. *New York,* 345 U. S. 959, application for certiorari, pp. 9-10, 14-15; s. c., 345 U. S. 1004, petition for rehearing, pp. 6-8). As subsequently expounded to the District Court, the contention was that the district attorney maintains "a secret file relating to the 'past performances' of 'repeater' special jurors thus enabling him to exclude a proposed special juror who may have formerly served on an acquitting jury, with the result that—unknown to the defense—the jury box can be filled in part or entirely of special jurors who have previously voted for convictions" (application for *habeas corpus,* paragraph SEVENTEENTH). With respect to this, the petitioner asserted that a hearing should be held by the District Court "to determine whether fundamental rights specially secured by the Federal Con-

stitution are invaded by such mode of trial'' (application for *habeas corpus,* paragraph SEVENTEENTH).

The whole contention was utterly without application to the present proceeding. No objection was made in the trial court to the prosecution's use of its records pertaining to special jurors. On the contrary, petitioner merely requested that he be allowed the equal use of the record pertaining to any talesman who testified, on *voir dire,* that he had previously served in a first-degree Murder case, and the trial court immediately granted the request (20-1). Moreover, the record does not disclose whether or not any talesman did so testify, or what talesmen were peremptorily challenged by either side. Thus, the petitioner's contention has no foundation in the trial record.

As has been indicated, the only one of petitioner's claims that was raised in the New York courts was that the trial court's granting of the special jury motion on allegedly insufficient motion papers, and the construction and application of section 749-aa, subdivision 4, of the New York Judiciary Law as authorizing the trial court's action, deprived him of rights under the Fourteenth Amendment. Each of the other claims—that the concept of the special jury as such, the composition of the New York County special jury panel and the prosecution's records of special jurors are all repugnant to the Constitution—was urged in the federal courts for the first time. They were, therefore, not cognizable by the District Court on the instant *habeas corpus* application (*Brown* v. *Allen,* 344 U. S. 443, 480 n. 24, 486; see *Darr* v. *Burford,* 339 U. S. 200, 203; *cf. In re Wood,* 140 U. S. 278, 285; *Ex parte Spencer,* 228 U. S. 652, 660; *Davis* v. *Burke,* 179 U. S. 399).

Conclusion

The District Court's denial of the writ of *habeas corpus* was correct, since none of petitioner's claims there served to raise a constitutional question of any substance. Moreover, with one exception, those claims were not cognizable on *habeas corpus* in any event because they had not been made in the state courts.

Respectfully submitted,

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March, 1954

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HAROLD B. WILL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 447 MISC.

WILLIAM VANDERWYDE,

Petitioner,

against

WILFRED L. DENNO, Warden of Sing Sing Prison, Ossining, New York,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RUDOLPH STAND,
Counsel for Petitioner.

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TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, WILLIAM VANDERWYDE, a state prisoner confined in the Death House at Sing Sing Prison, Ossining, New York, prays that this Court grant rehearing of its order of April 12, 1954, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed in this Court on February 27, 1954.

Mr. Justice Black and Mr. Justice Douglas, are of the opinion certiorari should be granted herein. Mr. Justice Jackson took no part in the consideration or decision of the case.

The petitioner was convicted by a special or so-called "blue-ribbon" jury in the Court of General Sessions, New York County, of the crime of Murder in the First Degree and sentenced to suffer the punishment of death. In due course, he filed a petition for a writ of *habeas corpus* in the District Court and prayed for *"a full and complete hearing"* respecting the merits of his petition (Appendix to Appellant's Brief, pp. 3-12).*

Reasons for Granting Rehearing and Issuing the Writ

I.

The petition for certiorari presented a substantial federal question which justified a review of the case.

II.

The claims urged by petitioner were cognizable on habeas corpus, were properly raised by him in all proceedings before the Trial Court, in the New York State Court of Appeals and the Federal District Court was therefore empowered to issue the writ of habeas corpus herein.

It is proper to state that in presenting this application we have clearly in mind the stringent limitations imposed by Rule 33 with reference to petitions for rehearing after denial of certiorari. In view of our belief that the possibility exists that this Court may have overlooked the principles asserted in previous decisions by this Court in *habeas corpus* proceedings and certain of the controlling facts in this case, we are oppressed with a distressing doubt as to whether we have adequately presented the petitioner's contentions in a case in which his life is at stake.

---

* References are to the pages of the certified record (Appendix to Appellant's Brief submitted with the petition for certiorari herein).

Our study of the cases in this Court reveals that in a few instances, a successful petition for rehearing did no more than clarify the arguments advanced in the original petition for certiorari (*Hickman* v. *Taylor,* 327 U. S. 808 328 U. S. 876, 329 U. S. 495; *Brinkerhoff-Faris Trust Co.* v. *Hill,* 280 U. S. 604, 550, 281 U. S. 673). These were civil cases. With the delicate duty and grave responsibility resting upon an advocate in a capital case, we crave the further indulgence of this Court for an opportunity to strengthen the petitioner's contentions.

The respondent, in opposition to the petition, argued that the petitioner urged in the Federal courts for the first time his claims that the concept of the special jury as such, the composition of the New York County special jury and the prosecution's records of special jurors are all repugnant to the Constitution of the United States, depriving him of rights under the Fourteenth Amendment (respondent's brief in opposition to certiorari, p. 9).

We disagree with this contention. The validity of the special jury statute (N. Y. Judiciary Law, Section 749-aa, subd. 4) was assailed by petitioner as unconstitutional under the due process clause of the Fourteenth Amendment in all proceedings before the trial court and in the New York State Court of Appeals as shown by the following page references to the certified record of the trial submitted on the petition for certiorari in this case (Notice of Appeal, Rec. 2-4; Endorsement on Indictment reciting the defendant's opposition to the motion for a Special Jury, Rec. 7; 12-17; trial proceedings, Rec. 19-20, 24). The questions were thus raised and considered in the trial court and were raised and considered in the Court of Appeals. The Court of Appeals, in passing upon the contentions of the petitioner, dealt with the questions as Federal questions and decided that no rights of the petitioner under the Fourteenth Amendment had been violated or denied (See *People* v. *Vanderwyde* (1953) remittitur amended, 305 N. Y. 552).

It is clear from the record that the validity of the special jury statute and its construction and application in this case was drawn in question and properly challenged as a violation of petitioner's constitutional rights under the Fourteenth Amendment in the state courts and was explicitly decided below.

We submit that the petitioner had the absolute right in the subsequent *habeas corpus* proceeding to advance different theories or arguments in support of the federal questions actually raised in the state courts and inextricably connected therewith. He was not restrained in the Federal courts to the same arguments which were advanced in the State Courts upon such Federal question. It is stated on this subject with clearness and force by Mr. Justice Peckham in *Dewey* v. *Des Moines,* 173 U. S. 193, 197-8:

> "If the question were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued."

We maintained, among other matters, in our original petition for certiorari that under the command of the statute (28 U. S. C. § 2243), the *petitioner was entitled to a hearing* on the factual issues raised in his petition for a writ of *habeas corpus* relating to:

(a) the statistics contained in the 18th Annual Report (1952) of the Judicial Council of the State of New York in its survey of special juries covering the judicial years 1941 through 1950;

(b) the unfair system in operation with respect to the secret file kept by the prosecutor of the past performances of "repeater" blue ribbon juries.

In *House* v. *Mayo,* 324 U. S. 42, 45, it was held in a *Per Curiam* opinion:

> "Since the petition for habeas corpus was denied without requiring the respondent to answer and without a hearing, we must assume that the petitioner's allegations are true. *Williams* v. *Kaiser,* 323 U. S. 471, 473-474."

We most earnestly submit that the system assailed in our petition pertaining to the prosecutor's use of a secret file containing the records of the past performances of repeater "blue ribbon" jurors violates an accused's right to be tried before an impartial jury. Due process implies and requires trial by an impartial jury and not a packed jury. Yet, under this system a prosecutor can fill the jury box with "repeaters" who are known to him to be convicting jurors. A trial with such concomitants is a mere sham and pretense and as said in *Moore* v. *Dempsey,* 261 U. S. 86, 91, "the whole proceeding is a mask."

Conclusion

For the reasons assigned above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit as prayed in the petition.

RUDOLPH STAND,
Counsel for Petitioner.

Certificate of Counsel

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

RUDOLPH STAND,
Counsel for Petitioner.